NO. 83606-0

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint of:

DAROLD RAY STENSON,

Petitioner.

RAP 16.9 REPLY TO SIXTH PERSONAL RESTRAINT PETITION

ROBERT H. GOMBINER
WSBA # 16079
Federal Public Defender's Office
1601 Fifth Avenue, Suite 700
Seattle, Washington 98101
(206) 553-1100

SHERYL GORDON McCLOUD
WSBA # 16709
710 Cherry Street
Seattle, Washington 98104-1925
(206) 224-8777

Counsel for Mr. Stenson

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

DOCKETED CASE

OTHER AUTHORITY

I. INTRODUCTION

Judge Williams, the trial judge in Petitioner Darold Stenson's case, concludes that "[t]here is no doubt that the gunshot residue testimony was of substantial significance" and that "[t]here is also no doubt . . . that had the Defense known that Detective Martin had handled the pants without gloves, and that someone (apparently he), had turned the pockets inside-out four days prior to the swabbing for gunshot residue, and that the actual results of the testing showed only a very small amount of potential gunshot residue in the pocket, that testimony would have had much less impact as to culpability than it did." Memorandum Opinion at 5. The State's response does not address or rebut the trial court's findings.

The State also fails to defend the manner in which the prosecution elicited misleading testimony and made false arguments that Mr. Stenson's pants pockets could not have been contaminated and that the only possible explanation for the test results was that Mr. Stenson's hands had been in a shooting environment. Nor does the State address that Detective Martin sat next to the prosecutor while this testimony and argument was given.

Instead of dealing with the merits, the State asks for dismissal on the grounds that Mr. Stenson has brought his claim too late and has not exercised "due diligence." However, the undisputed facts show that Mr. Stenson acted promptly once he learned of the problems with the gunshot residue testimony and that the State's argument for dismissal depends on the proposition that it should profit from its own wrongdoing.

II. UNDISPUTED FACTS

None of the following is in dispute.

1. It was not until May 21, 2009 that Mr. Stenson came into possession of the FBI reports which showed, among other things, the amount of gunshot residue found in the sample taken from his pants pocket, the fact that the testing was performed by Kathy Lundy, rather than Roger Peele, the agent who testified at trial, and the raw test results for gunshot residue.

2. On April 14, 1994, Rod Englert took pictures of Detective Martin wearing Mr. Stenson's pants with the pants' pockets turned out. These pictures show that Detective Martin was not wearing gloves when he wore Mr. Stenson's pants.

3. On January 8, 2009, the State filed a declaration from Detective Martin in which he asserted that when he handled Mr. Stenson's pants he wore gloves.[1] *See* Martin Affidavit, Attachment A.

4. Rod Englert was not a witness at Mr. Stenson's trial and the pictures he took were never turned over to the defense.

5. None of the reports authored by Detective Martin revealed how he had handled the pants pockets on April 14, 1994, prior to taking the gunshot residue swab from the pants on April 20, 1994.

6. In 1997, in replying to Mr. Stenson's personal restraint petition the State wrote "that Rod Englert was not a witness at the trial and had no effect on the trial." *See In re the Personal Restraint of Stenson*, No. 66565-6, State's Response at 70.

7. In 1993 the trial court ordered that the State disclose all reports of its experts to the defense and in 1994, in connection with the DNA *Frye* hearing, the State was ordered to disclose "all bench notes, etc." of any expert who examined evidence in the case. The

---

[1]This declaration was filed as an attachment to the State's Supplemental Memorandum Regarding the Propriety of Further DNA Testing, filed in Clallam County Superior Court, No. 93-1-00039-1.

order was not limited to experts who had analyzed evidence in connection with DNA testing. *See* Rule 7.8 Motion, Exhibit B (February 4, 1994 Discovery Order).

8. When the defense complained that the State had failed to disclose expert reports the State characterized the complaints as "hysterical, base, and baseless allegations" State's Response, Appendix D at 7, and assured the Court that "I think, if anything has been demonstrated, it has been that we have provided discovery to the defense even when we don't have to or didn't have to, to put them on notice and keep them on notice and let them know about information, even from people we are not going to call as witnesses." 6/14/94 Tr. at 123.

9. The only report from Roger Peele turned over to the defense was two pages long. *See* State's Response, Appendix I.

10. During hearings, the State claimed that it was frequently in contact with the FBI agents performing testing. "Mr. Errera, and I have had many conversations with him and other FBI agents, they are merely a phone call away." 6/14/94 Tr. at 120-21.

11. At no point did the State ever advise the defense that it

was not receiving from the FBI any of the underlying data on which the FBI gunshot residue expert was basing his conclusions.

12. Even though Kathy Lundy was the person who actually tested the gunshot residue, the State never turned over her report to the defense.

13. During the trial, the State vehemently argued that any suggestion that the gunshot residue sample could have been contaminated amounted to no more than desperate speculation on the part of the defense. 8/9/94 Tr. at 1779-80.

III. THIS COURT SHOULD CONSIDER THE MERITS OF MR. STENSON'S CLAIM

A. Mr. Stenson's Pro Se PRP Does Not Contain the Same Claim.

The State first asserts that Mr. Stenson's pro se personal restraint petition (Wa. S. Ct. No. 83130-1) advances the same claim made in this PRP. Response at 25. Perhaps realizing that the record belies this argument, the State does not offer any further argument or analysis regarding this point. Mr. Stenson's pro se PRP is based upon the single claim that he was denied the effective assistance of counsel guaranteed by Article I, § 22 of the Washington Constitution

and the Sixth and Fourteenth Amendments to the United States Constitution. In contrast, the instant petition is based upon the claim that the State's failure to provide exculpatory evidence and failure to correct false testimony violated Mr. Stenson's Fourteenth Amendment right to due process of law. There is no merit to the State's position that the two petitions contain the same claim.

B. The State Overstates the Limitations of RCW 10.73.100.

The State also argues that if any of the evidence is found to be not newly discovered, then Mr. Stenson's entire claim must fail. Response at 27. This assertion also lacks support. Although "mixed petitions" – those petitions which include both time-barred claims and timely claims – must be dismissed, *see, e.g., In re Stenson*, 150 Wn.2d 207, 220, 76 P.3d 241 (2003), Mr. Stenson's petition is based on the single claim that the State's failure to provide exculpatory evidence and correct false testimony violated Mr. Stenson's Fourteenth Amendment right to due process of law.

C. Mr. Stenson's Allegations Are Sufficient to Warrant a Reference Hearing.

The State also argues that Mr. Stenson's petition fails because

it does not contain a declaration from trial counsel, the defense investigator, or Rod Englert asserting that the trial team possessed neither the photographs nor the GSR results. Response at 29-30.

First, the State fails to appreciate the significance of the factual record. The State has offered affidavits that establish that the FBI was not contacted by counsel for Mr. Stenson until 2009. The State itself claims not to have had either the GSR results or the photographs. Indeed, in January of this year, the State was apparently still under the misapprehension that Detective Martin had acted with care in handling Mr. Stenson's pants. In relation to Mr. Stenson's motion for DNA testing, the State submitted in Clallam County Superior Court an affidavit from Detective Martin in which he wrongly asserted that he wore protective gloves when handling Mr. Stenson's pants at the Intermountain Forensic Laboratory. *See* Martin Affidavit, Attachment A.

Second, the State ignores the governing law. "To obtain an evidentiary hearing, the petitioner must demonstrate that he has competent, admissible evidence to establish fact which would entitle him to relief." *In re the Personal Restraint of Lord*, 123 Wn.2d 296,

303, 868 P.2d 835 (1994). Mr. Stenson has offered material factual support for his claim that the State has violated its obligations under *Mooney v. Holohan*, 294 U.S. 103, 55 S. Ct. 340, 79 L.Ed. 791 (1935), *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L.Ed.2d 1217 (1959), and *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963). *See also Kitsap Cty. Deputy Sheriff's Guilt v. Kitsap County*, 2009 WL 3465930, at *10, __ Wn. __, __ P.3d __ (Oct. 29, 2009) (Johnson, J., dissenting) (recognizing constitutional obligation to disclose material information to the defense, including impeachment evidence). The State's position must be rejected.

D. The State Ignores Its Obligations and Mr. Stenson's Reliance On Its Representations and Obligations.

The State insists that Mr. Stenson's PRP was not timely filed because he did not contact the FBI until 2009. What the State fails to account for – and what is critical to the analysis – is that the State not only failed to fulfill its discovery obligation, but also affirmatively misled Mr. Stenson and his lawyers for 15 years about whether it had fulfilled them. Although Mr. Stenson did not contact the FBI until 2009, he relied upon the word of the Clallam County Prosecutor and the belief that the prosecutor would honor its

discovery obligations.

During hearings prior to trial the State portrayed itself as unfailingly accommodating and open in its discovery policies and vehemently refuted the defense suggestions that evidence was not being disclosed as "hysterical, base, and baseless allegations." Response, Appendix D at 7. At trial itself, the State took pains to assure the jury that the evidence had been handled in the most professional manner and to portray the defense as grasping at straws by claiming that the gun shot residue evidence could be contaminated. *See, e.g.,* 8/9/94 Tr. at 1779-80.

The State's argument ignoring its representations and obligations is exactly the type of argument rejected in *Strickler v. Greene*, 527 U.S. 263, 119 S. Ct. 1936, 144 L.Ed.2d 286 (1999). The Court held that the petitioner was not obligated to pursue clues that suggested the existence of other evidence where he "had no basis for believing the Commonwealth had failed to comply with *Brady* at trial." *Id.* at 287.

As Judge Williams found, "the actual discovery requests and court discovery orders in place at the time" of trial answers that the

evidence could not have been reasonably discovered before trial by exercise of due diligence. Memorandum Opinion at 5.

E. The "Unclean Hands" Doctrine Applies.

The due diligence and timeliness requirements of RCW 10.73.090 and 10.73.100 are not meant to reward the State for keeping the truth hidden. The equitable "unclean hands" doctrine bars the state from hiding evidence and then claiming that the petitioner is too late in raising the issue.

Equitable doctrines apply in post-conviction and criminal proceedings. In other cases, the State has asserted this position. *State v. Mason*, 160 Wn. 2d. 910, 924-27, 162 P.3d 396 (2007) (Court agreeing with state argument that equity compels adoption of the forfeiture by wrongdoing doctrine). Application of the "unclean hands" doctrine is especially appropriate here, considering the brazen way in which the prosecution ridiculed the possibility that the gunshot residue sample had been contaminated while suppressing how the sample had been handled by the lead detective in the case.

F. The State Cannot Account for the False and Misleading Testimony Offered at Trial.

The State defends its failure to reveal who actually did the

testing with a restaurant analogy. "Characterizing the GSR examination as Mr. Peele's, is no less true than a chef stating that it is his entree, when a prep cook actually sauteed the vegetables, stirred the sauce, and grilled the meat." Response at 37. This comparison is not apt. If the sous chef has hepatitis B the health inspector would hardly be satisfied to know that the chef himself enjoys good health.

The emerging evidence of Kathy Lundy's role – and the State's apparent reliance upon her work – raises more questions than it raises. Her work is particularly untrustworthy. Ms. Lundy has now admitted to providing false testimony in a murder case, *see Haynes v. United States*, 451 F. Supp. 2d 713, 719 n.4 (D. Md. 2006); Murray Evans, *FBI agent sentenced in false swearing case*, The Cincinnati Enquirer, June 18, 2003, available at http://www.enquirer.com/editions/2003/06/18/loc_kyfbiagent18.html . The State has provided no information to Mr. Stenson regarding Ms. Lundy's false swearing conviction or any other concerns about the reliability of her work.

Moreover, the State does not address the fact that Detective

Martin never corrected the false testimony regarding the handling of the pants and that the State took advantage of the misinformation at trial. Roger Peele testified at trial that even though the sample had been collected over a year after the shootings the evidence could still be relied so long as the pockets had remained undisturbed. This testimony was affirmatively elicited by the prosecutor. 7/28/94 Tr. at 1109. Detective Martin, the lead detective on the case, sat silent. The defense, the prosecution expert and the jury alike never learned that the integrity of the pockets was very much in question because of Detective Martin's handling of the pants, including that the pockets themselves were turned out while in a crime laboratory.

The State's response to this crucial information is to ignore it. This Court, however, should consider the false testimony and that the State not only failed to correct the misinformation, but took distinct advantage of it.

G. The Newly Discovered Evidence Is Not Cumulative or Merely Impeaching.

The State also tries to paint the newly-discovered evidence of contamination as cumulative. It was not. There was no other evidence showing minuscule amounts of gunshot residue, no other

evidence demonstrating a known and documented avenue of contamination, and no other evidence of gross mishandling of the pants.

The State quotes at length from Agent Peele's testimony and from the defense closing argument and then implies that because Mr. Peele was questioned about contamination and because the defense alluded to the possibility of contamination from either the police car in which Mr. Stenson was placed following the shooting or the FBI laboratory, that the newly discovered evidence is cumulative. Response at 11-12, 18-20, 38.

The State's interpretation of Agent Peele's testimony and the defense closing is illogical. First, Agent Peele's testimony about contamination relies on precisely what the new evidence shows to be false – that there was no evidence that the pants pockets had come into contact with gunshot residue contaminated hands since being placed into evidence. Thus, when Agent Peele testified that "the hand is the important thing", Response at 38, he said this unaware that the "hand" could have been Detective Martin's and not Mr. Stenson's. Indeed, Agent Peele's testimony makes clear that he had

no inkling of how the pants had been handled prior to the gunshot residue sample being procured. Second, the defense argument on contamination lacked a solid basis and only precipitated a withering rebuttal argument. 8/9/94 Tr. at 1779-80. Again, this was because the State had suppressed the truth about how the pants had been handled.

Likewise, the evidence was not "merely" impeaching, but was critical to Mr. Stenson's case. *State v. Roche*, 114 Wn. App. 424, 59 P.3d 682 (2002). Like the evidence considered by the Supreme Court in *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995), the impact of the new evidence would have been manifold. In *Kyles*, the Supreme Court explained the effect of the suppressed evidence: "Damage to the prosecution's case would not have been confined to evidence of the eyewitnesses, for Benaier's various statements would have raised opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation as well." *Kyles*, 514 U.S. at 444. Here, the newly-discovered evidence would have gutted the State's

argument regarding the gunshot residue, demonstrated the mishandling of a critical piece of physical evidence, undermined confidence in the forensic evidence generally, and raised questions about the objectivity of the investigation and the reliability of the State's key witnesses. *See* Rule 7.8 Motion at 14-18.

Moreover, even if the evidence is "merely" impeaching, Mr. Stenson can nonetheless establish a *Brady* violation, *see United States v. Bagley*, 473 U.S 667, 105 S. Ct. 3375, 87 L.Ed.2d 481 (1985), and this Court should consider the merits of his claim.

IV. CONCLUSION

This is a death penalty case where forensic evidence, including the gunshot residue evidence, is of central importance, where the State's evidence as to motive is weak. It is a case where (contrary to the State's assertion in its response, page 38) there was evidence at trial that other adults were present at Dakota Farms at the time of the murders (specifically David Oberman and Tracie Reed, *see, e.g.*, 8/8/94 Tr. at 1592, 1595-98, 1611-13). It is a case where new evidence has emerged of other suspects (*see* Transcript of Interview of Robert Shinn, Attachment C). And it is a case where

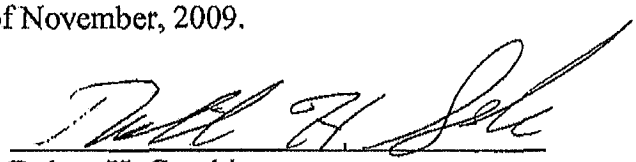
the defendant has always insisted on his innocence.

At trial and throughout the appellate and post conviction process the State has asserted that the physical evidence against Mr. Stenson is incontrovertible. Cloaking a death penalty sentence in the mantle of scientific certainty is common. Unfortunately, as a number of recent cases show, such certainty may be misplaced. (See, for example, the recent controversy regarding the execution of Cameron Willingham, following a trial where the proof of guilt depended on arson expert testimony. David Grann, *Trial by Fire*, The New Yorker (Nov. 9, 2009), available at http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann). Although the State would prefer a review process in which the consequence of the conviction (execution) is not even considered and has gone so far as to request that Judge Williams be removed from the case because he believes that death penalty cases require particular care, such an approach is not good law or good policy.

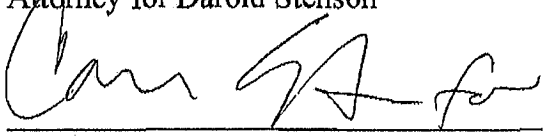
The jurors who convicted and sentenced Mr. Stenson did so without learning crucial information about how the gunshot residue evidence was handled, who did the testing, or what the results meant

and after hearing arguments that affirmatively misled them about the integrity of the evidence. The State's efforts to avoid grappling with the impact of these undisputed facts should be rejected. The requirement of due diligence on the petitioner's part is not meant to reward the State for keeping the truth hidden.

Dated this 9th day of November, 2009.



Robert H. Gombiner
WSBA # 16059
Attorney for Darold Stenson



Sheryl Gordon McCloud
WSBA # 16709
Attorney for Darold Stenson

CERTIFICATE OF SERVICE

I certify that on November 9, 2009, I served a copy of the above-noted document by e-mail to: Assistant Attorney General John J. Samson at johns@atg.wa.gov; Clallam County Prosecuting Attorney Deborah S. Kelly at dkelly@co.clallam.wa.us; Special Deputy Prosecuting Attorney Pamela Loginsky at pamloginsky@waprosecutors.org; Assistant Attorney General Shannon Inglis at ShannonI@atg.wa.gov.

DATED this 9th day of November, 2009, at Seattle, Washington.

Barbara Hughes

SUPERIOR COURT OF WASHINGTON
COUNTY OF CLALLAM

IN RE THE PERSONAL RESTRAINT PETITION OF:

DAROLD RAY STENSON,

Petitioner,

Supreme Court No. 83130-1
Clallam County No. 93-1-00039-1

IN RE THE PERSONAL RESTRAINT, PETITION OF:

DAROLD RAY STENSON,

Petitioner

Supreme Court No. 83606-0
Clallam County No. 93-1-00039-1

REFERENCE HEARING
FINDINGS AND CONCLUSIONS

PROCEDURAL HISTORY

This matter was remanded to this court for a reference hearing.

Following that hearing this court makes the following FINDINGS OF FACT and CONCLUSIONS RE REFERENCE HEARING:

1. Darold Stenson was convicted of two counts of Aggravated First Degree Murder for the March 26, 1993, shooting deaths of his wife and business partner. The State sought the death penalty. Mr. Fred Leatherman and Mr. David Neupert were defense counsel. The Prosecutor was Mr. David Bruneau.

2. Prior to trial there were numerous hearings and discovery orders entered. On June 4, 1993, the trial court entered an Omnibus Order compelling the State to provide the defense with all evidence "favorable to the defense on the issue of guilt and to provide the defense with the name of every expert witness and a copy of that witness's report." (Reference hearing Ex. 11) On October 8, 1993, another discovery

KEN WILLIAMS
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

order – the Reciprocal Order – was entered. (Reference hearing Ex. 10) The Reciprocal Order compelled the State to provide the defense with "reports, letters and conclusions prepared by or on behalf of lab or other forensic experts."

3. Trial commenced with motions on June 6, 1994. Jury selection took place from June 13, 1994, through July 14, 1994. The presentation of testimony began on July 18, 1994 and ended on August 13, 1994. Mr. Stenson was found guilty. A special sentencing hearing was held on August 15 through August 19, 1994. The jury found an absence of mitigation. Mr. Stenson was sentenced to death.

4. Mr. Stenson's conviction was appealed to the Washington State Supreme Court and affirmed at 132 Wn. 2d 668, 940 P. 2d 1239 (1997). Four subsequent Personal Restraint Petitions were filed and rejected by the Court.

5. Mr. Ron Ness and Ms. Judith Mandell were appointed on behalf of Mr. Stenson to file an initial Personal Restraint Petition. In 2001 Robert Gombiner and Sheryl McCloud, Mr. Stenson's current counsel, were appointed on his behalf.

6. On May 26, 2009, Mr. Stenson filed a Personal Restraint Petition on his own behalf with the Washington State Supreme Court. (PRP No. 5.) On August 6, 2009, Mr. Gombiner and Ms. McCloud filed a motion in the Clallam County Superior Court for either a new trial or vacation of the sentence of death. That matter was referred to the Washington State Supreme Court, and is Personal Restraint Petition No. 6.

7. On December 8, 2009, the Washington State Supreme Court directed a reference hearing on specific questions relating to two matters which are claimed to be newly discovered evidence. These are the bench notes and data from the FBI lab, and

KEN WILLIAMS
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

photographs (the Englert photos) showing Mr. Stenson's pants being handled by an ungloved law enforcement officer, with the pockets turned inside out, six days prior to the pockets being sampled for gunshot residue.

8. This court held a reference hearing beginning on the 8th of March, 2010, which concluded on the 18th of March, 2010, after eight days of testimony.

9. The Washington State Supreme Court has requested answers to the following questions:

"Whether the photographs and FBI file satisfy each factor of the five-part "newly discovered evidence" test. See In re Personal Restraint of Stenson, 153 Wn. 2d 137, 144, 102 P. 3d 151 (2004). These factors are whether the evidence (the photographs and the FBI file):

(a) will probably change the result of the trial or proceedings,
(b) was discovered since the trial or proceedings,
(c) could not have been discovered before the trial or proceedings by the exercise of due diligence,
(d) is material, and
(e) is not merely cumulative or impeaching.

Id. (quoting In re Pers. Restraint of Brown, 143 Wn. 2d 431, 453, 21 P. 3d 687 (2001) (quoting State v. Williams, 96 Wn. 2d 215, 222-23, 634 P. 2d 868 (1981)).

In addition, the trial court shall determine whether:

(1) Stenson acted with reasonable diligence in discovering the photographs and the FBI file, see RCW 10.73.100(1),
(2) Stenson acted with reasonable diligence in filing the 'Personal Restraint Petition' (No. 83130-1),
(3) Stenson's counsel acted with reasonable diligence in discovering the photographs and the FBI file, see Id., and
(4) Stenson's counsel acted with reasonable diligence in filing 'Petitioner Darold Stenson's Motion to Vacate Conviction or Alternatively Vacate Sentence of Death Pursuant to CrR 7.8(b),' later accepted by this court for consideration as a Personal Restraint Petition (No. 83606-0), see Order 569/113 (Oct. 1, 2009)."

KEN WILLIAMS
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

GUNSHOT RESIDUE (GSR)

10. The issues raised involve gunshot residue (GSR). Gunshot residue is only created during the discharge of a firearm. As the primer in a firearm ignites it creates a cloud and within the cloud are spherical particles which contain antimonium, barium and lead. These are quite small, and are easily transmitted from one object to another. They are small enough to be able to "float" in the air. They are not visible without magnification. Special Agent Ernest R. Peele of the FBI testified at trial that gunshot residue was found in Mr. Stenson's right, front pocket. Special Agent Peele assumed the dab sampling test was done on the pockets during the early stages of the investigation before everything was handled or "fooled with" (Reference Hearing exhibit 14.) In actuality the dabs had only been taken at late stages of the investigation and more than one year after the pants were seized and after the pants had traveled to the FBI laboratory in the Hoover Building in Washington D.C., to the Intermountain Laboratory in Portland, Oregon, and to other places.

11. In 2005 it was learned the Hoover Building, which contained two shooting ranges, was itself contaminated with GSR.

12. Lead Detective Monty Martin testified at trial that he took the dab samples used for the gunshot residue test.

Question: "You mean you turned the pockets inside out?"

Answer: "Yes, sir."

Question: "All right. Then took those dabbings?"

Answer: "Yes, I did."

Question: "When did you do that?"

KEN WILLIAMS
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

Answer: "I did that on April 20, 1994, at 10:41 in the morning." (RP 102-103)

13. The answers of Special Agent Peele at trial included the following (RP 671):

> "The particles there are not removed if nothing is physically done to the surface. Or in this case, let's say the interior of the pocket. If things come in contact with the interior of the packet (sic), things are removed from the interior of the pocket, then the potential for removing particles comes into play. Potential for adding contamination comes into play."
>
> "So depending on what's being done and what happens to the interior of that pocket, if nothing happens to the interior of the pocket then nothing is disturbed."
>
> "If the interior of the pocket is used for everything (sic), then something can happen to the particles, taking away or adding."

14. Detective Martin was present when Special Agent Peele testified in 1994.

15. There is no dispute that the right front pants pocket of Mr. Stenson contained a few particles of gunshot residue. Unless a massive amount of GSR is found the number of particles is of relative insignificance. A small amount only has meaning because particles are in fact present. A finding of small amounts may suggest contamination of the sort discussed by Special Agent Peele or may merely be limited through the nature of the sampling technique used.

16. The finding of GSR within a pants pocket reasonably leads to a conclusion that something containing gunshot residue went into the pocket. The first two items that inferentially jump to mind are a firearm or a hand after it has fired a

KEN WILLIAMS
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

firearm. Those inferences change dramatically if the pocket has been turned inside out prior to sampling. The potential sources of contamination broaden considerably.

17. Dr. Jean Arvisu, an expert in quality assurance for testing laboratories, testified at the reference hearing. She opined that under the circumstances now known there would be no validity to the GSR results to any reasonable degree of scientific certainty. She testified our ability to detect GSR exceeds our ability to ascribe significance to the finding. Finding GSR on clothing is especially problematic. She testified that the FBI lab's own contamination of evidence with GSR was first disclosed in a 2005 FBI symposia. The lab problems were not known at the time of the Stenson trial. Dr. Arvisu testified that although Special Agent Peele's testimony was accurate it was so narrowly focused that it didn't adequately address sources of uncertainty. She testified that if dabs were taken from outside of the pockets there would be more concern of contamination than if taken from the inside. She stated: "Seeing the pockets turned out drives me crazy." She testified that collectively Special Agent Peele's answers were very misleading because they implied that the "shooting incidents" in his testimony were the shootings at issue in the trial, when any "shooting environment" would have been enough to account for the GSR found. A "shooting environment" for GSR purposes could include even a home where firearms are merely stored. Dr. Arvisu testified that in light of the Englert photos the presence of GSR "in" Mr. Stenson's pocket does not lead to any reasonable conclusion as to how it might have gotten there.

BRADY ISSUES:

KEN WILLIAMS
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

The State argues that the two items of evidence at issue were in existence prior to the initial trial of Mr. Stenson, and were available defense counsel both then and subsequently. The defense argues that Mr. Stenson's defense and post-conviction counsel acted diligently but nevertheless did not learn the truth "because they relied in good (albeit misplaced) faith on the State's assertions that it was turning over all Brady evidence and forensic results and because an unusual sequence of events operated to cloud the truth." (Petitioner's trial brief, page 2, lines 3 - 5.)

Petitioner's Post-hearing Brief discusses Brady (*Brady vs. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)) and subsequent cases and states: "Those cases and their progeny hold that when the state puts on false evidence and makes false and misleading arguments to a jury, a new trial is required if any "reasonable likelihood: exists that the misconduct affected the verdict." (Petitioners Post-hearing Brief, pg. 2, lines 8-10)

18. This court's ability to act in a case that is pending at an appellate court is limited. The questions sent to the undersigned by the Washington State Supreme Court do not include a request to determine whether or not Brady violations occurred. This court will therefore not attempt to determine that issue. Nor will this court apply the "reasonable likelihood" standard used in cases where a new trial is requested under Brady analysis. The requirements of Brady , however, also relate to discovery obligations and may therefore be relevant to the question of whether or not defense counsel and/or Mr. Stenson acted with due diligence under the circumstances. Brady requires a prosecutor to disclose all evidence in his or her possession that might be favorable to the defense. In *United States v. Agurs*, 427 U.S. 97 (1976), the Court held

KEN WILLIAMS
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

that a prosecutor has a duty to disclose exculpatory material even in the absence of a request by defense. The duty to disclose may extend to those working on the prosecutors behalf, including law enforcement officers. *State v. Lord,* 161 Wn. 2d 276, 292, (2007) A prosecutor may even have a duty to learn of any exculpatory evidence known to those acting on the State's behalf. *Kyles v. Whitley,* 514 U.S. 419, 436-438, (1995)

HOW DEFENSE OBTAINED THE FBI FILES AND ENGLERT PHOTOS

19. Defense counsel Robert Gombiner testified that on the 26th of November and again on the 3rd of December 2008, he received letters relating to comparative bullet lead analysis. The latter letter stated that Special Agent Peele who had testified about bullet lead analysis at the Stenson trial had exceeded the scope of what the evidence could have shown. The bullet lead testimony was of virtually no significance in Mr. Stenson's case. Nevertheless, defense counsel determined they should look closer at all of Special Agent Peele's testimony.

20. After the November 26, 2008 letter, the defense decided to re-interview a number of people. The interviews were not focused solely on GSR issues or Special Agent Peele's testimony. The defense at that time also had information about specific other potential suspects based on a report made to law enforcement in 2008 by Mr. Robert Shinn. A stay of execution was in place. However, counsel felt the stay was precarious and so defense "were throwing out as wide a net as they could" to be able to present an "actual innocence" claim. They primarily wanted to re-interview anyone who had worked on the blood spatter evidence. Mr. Englert was therefore

KEN WILLIAMS
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

contacted and his file examined. The photos from Mr. Englert's file were received by defense on January 7, 2009.

21. The Defense also requested more information from the FBI on all testing involved in the case and in January, 2009, asked Clallam County Prosecuting Attorney Deborah Kelly to help get the FBI files. Sergeant Martin requested the FBI file on March 17, 2009 (Reference Hearing Exhibit 7). The FBI provided the file to Sergeant Martin on May 15, 2009, and on May 21, 2009, the files were provided to Mr. Stenson's attorneys. Mr. Stenson was personally informed of the material contained in the FBI file shortly thereafter.

22. The lab notes indicate that Kathy Lundy, not Agent Peele, had actually performed the testing for GSR and that only four grains of GSR had been found after a series of examinations. (Dr. Arvisu believes the data supports only two grains.) To further investigate the significance of this information defense counsel contacted Dr. Arvisu. She was also provided the Englert photos (Reference Hearing Exhibit 4) .

23. The evidence contained in the FBI file and in the Englert photos as they relate to GSR were discovered by chance.

THE FBI LAB MATERIALS:

24. The State hired Mr. Rod Englert as a blood spatter expert. Detective Monty Martin took Mr. Stenson's pants to Mr. Englert on the 14th of April, 1994. Mr. Englert suggested to Detective Martin that Mr. Stenson's pants pockets be tested for GSR. The pants pockets were turned out that day to look for blood evidence. On a drawing of the pants, (Reference Hearing Exhibit 68) Mr. Englert's handwritten notes

KEN WILLIAMS
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

state : "check pockets for GSR" with arrows towards the pants pockets .There is a note slightly underneath that suggestion stating: "nothing visible." This does not mean that the pockets were checked for GSR on April 14, 1994. Mr. Englert's testimony at the reference hearing was that the pockets were checked for blood smear. The "check pockets for GSR" was only a suggestion for future examination and the "nothing visible" which is separated a bit and written with a lighter pressure likely refers to the lack of any blood stains or spatter on the left thigh area of the pants which is where the notation has been written on the drawing.

25. On April 20, 1994, in Detective Martin's garage, GSR sampling dabs of the pants pockets were taken as well as luminal testing of the pants. The pants pockets were again turned inside out. Debris from the pockets was separately packaged on April 20, 1994. (One wonders what debris there could have been since the pockets had been turned inside out six days earlier.) The dab samples were then sent to the FBI. Special Agent Peele issued his two page report on the 13th of June, 1994. (Ex. 17) This report was received by the defense on June 20, 1994. At the time of receipt of the GSR report trial had already commenced and jury selection was well underway. At that time the defense was dealing primarily with other forensics issues, particularly blood spatter issues which also arose near the trial date. The blood spatter issues were the subject of a request for a trial continuance and/or dismissal which was hotly contested due to the lateness of the issue being raised.

26. Special Agent Peele testified that he believes he would have brought the entire FBI lab file with him at the time of testimony. The trial transcript indicates he had an illustrative exhibit with him showing a cloud around a discharging gun which

KEN WILLIAMS
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

indicates he brought supporting material to trial. If it was present, the file would have been available for review at that time by either the State or the defense. Prior to that time, the FBI would only have released the file to the Prosecuting Attorney and the FBI policy would be to have provided the entire file only if it was asked for.

27. As might be expected memories have faded or disappeared over the 16 years since trial. For example, defense investigator Jeff Walker has no present recollections of any of the events in this case. Prosecuting attorney David Bruneau says he has some vivid recollections but has many areas without recollection or recall. Detective Sergeant Monty Martin has vivid memories which he now realizes are incorrect. Accordingly there is some difficulty in piecing together precisely what may have occurred at some of the earlier times for which inquiry needs to be made.

ANSWERS TO THE COURT'S QUESTIONS RE "NEWLY DISCOVERED EVIDENCE":

I. THE FBI FILES

As to the FBI files this court provides the following answers to the questions raised:

(a) Will the evidence probably change the result of the trial or proceedings?

28. Mr. Walker, the defense investigator, talked to Special Agent Peele on July 20, 1994, prior to the testimony on GSR, and issued a report to the defense attorneys. (Reference Hearing exhibit 14) In that report he indicates that Special Agent Peele told him that the testing by the FBI was qualitative not quantitative. He was told

KEN WILLIAMS
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

that the amount of GSR found would be insignificant beyond the fact that some GSR was found where it was found. Mr Walker was informed that issues of potential contamination were important to address. Mr. Leatherman indicated that the testimony of Agent Peele raised no red flags or significant issues with him. He believed that the FBI had in fact found some gunshot residue in Mr. Stenson's right front pants pocket. There is no reason to doubt that finding today. Mr. Leatherman believed that the testimony would indicate a number of inferences could be drawn from that testimony but that they would be limited. Appropriate attempts to limit the impact of the testimony were made at trial.

29. The present significance of the undisclosed FBI bench notes as they relate to GSR seems minimal. It is difficult to see how accurate testimony regarding which person performed the testing would have any direct significance to the result of the testing without some additional indication of testing protocol violation or incompetence. Nor does the actual number of particles of GSR found appear overly significant. All parties at trial were aware at the time that the test was qualitative rather than quantitative and were aware that some particles of GSR had been found. It is the finding of GSR that was significant not the quantitative amount which had been located.

The Petitioner argues that if the FBI lab files had been disclosed, either as required by discovery orders or under Brady, that such disclosure would have allowed impeachment of the State's inculpatory GSR evidence and undermined the State's argument that the forensics and law enforcement investigation were of the highest quality and any argument otherwise would be desperate speculation.

CONCLUSION:

KEN WILLIAMS
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 6
Port Angeles, WA 98362-3015

By itself the information in the FBI file would not likely have changed the court's allowance of the GSR test results nor precluded argument that the results could be deemed inculpatory. Accordingly, the Court finds that had the FBI file and the material contained within the FBI file been known at trial that information alone would have not "probably changed the result of the trial or proceeding."

(b) Was the evidence discovered since the trial and proceedings?

CONCLUSION:

Other than FBI personnel it appears that neither the State nor the defense had seen the full FBI lab file until the year 2009, long after the trial had been completed. To the extent the contamination of the Hoover Building with GSR is a factor that fact was also unknown at time of trial. The answer therefore is "yes."

(c) Could the evidence have been discovered before the trial or proceedings by the exercise of due diligence?

30. Mr. Leatherman testified that he was aware that he did not have the FBI bench notes. At the time he did not believe that was of any significance and he believed that issues relating to potential contamination could be raised to rebut the inferences which rose from finding GSR in Mr. Stenson's pockets.

31. The Court had issued various orders and certain representations had been made as to discovery. At the hearing on the motion to continue and/or dismiss, Prosecuting Attorney Bruneau promised that the defense would have all of the various expert and crime lab materials and bench notes and the names of all of the investigators.

KEN WILLIAMS
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

This did not occur. A question is raised whether or not the defense was entitled to rely on those representations and would therefore be excused from further efforts in discovering the materials. This is where the implications of Brady come into play. Brady requires disclosure of potentially exculpatory evidence under certain circumstances whether requested by defense or not. This may include evidence which is impeaching in character as well. *United States v. Bagley*, 473 U.S. 667, 677 (1985)

32. Black's Law Dictionary defines "due diligence" as "such a measure of prudence, activity, or assiduity as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case." (*Black's Law Dictionary*, Revised Fourth Edition, West Publishing Company (1968))

In some respects the State seems to argue for the proposition that the standard of due diligence is one of perfection. In other words, if something could possibly have been done to acquire the information, such as a Freedom of Information Act request or the like, and was not done, that such constitutes a failure of due diligence. Neither the author, nor likely any reader of this opinion could ever meet that standard. Reasonableness for purposes of due diligence presumes consideration of all of the circumstances under which the action was being taken.

33. Here there were different circumstances at each of the levels the Court is asked to inquire about. First, the GSR issue literally came up at the last minute. The defendant was in trial already and that circumstance is difficult to ignore. Investigation on GSR issues continued well into the presentation of testimony at trial. At the same

KEN WILLIAMS
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

time the defense was dealing primarily with other forensics issues, particularly the blood spatter issue which also arose only near the actual trial date itself and which became the subject of a heated motion for a trial continuance or dismissal. Mr. David Neupert, defendant's second chair trial counsel testified that the FBI report made it clear that attacking the methods of testing for GSR would not be fruitful. This Court finds it hard to fault the actions of defense counsel who at the time rightfully concluded that the FBI lab results would not likely be successfully challenged and that the defense should prioritize its efforts in areas more likely to be productive. All parties knew the bench notes existed. The bench notes well may have been literally in front of all the parties at the time of trial. Neither party apparently believed there was anything worth looking at in the FBI file. If, however, the material contained exculpatory or impeaching matter it should have been provided to defense counsel under Brady. Defense counsel had a right to rely on that requirement as well as its own reasonable assessment of need to further inquiry into the file and therefore had no duty to pursue further discovery when no materiality appeared likely.

CONCLUSION:

Simply put, if the test of due diligence is one of reason, and if there is no reason to seek, can there be a duty to nevertheless find? This court answers that question: "no." Therefore the court finds there was no lack of due diligence by defense trial counsel or defense counsel on subsequent PRPs in failing to discover the full FBI file material.

(d) Is the evidence material?

34. The material contained in the FBI bench notes was material to issues at trial. However, everyone at trial assumed that the FBI did a competent test. It did.

KEN WILLIAMS
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

Everyone assumed that the FBI found GSR particles in the pants pocket. It did. Everyone assumed that the amount of GSR was at the low end in terms of quantity. It was. Nothing contained in the FBI file would appear to change those conclusions which were testified to at trial. As Dr. Arvisu noted, Special Agent Peele's testimony was accurate, although potentially misleading. Nothing in the FBI lab file would have pointed to the potentially misleading characteristics of Special Agent Peele's testimony. The only potentially material aspect of the FBI notes is whether or not the testimony itself would have been allowed at all as to findings of GSR when the technician who did the examination was not at trial to testify as to the results she received, or whether the file contained potentially impeaching material.

CONCLUSION:

The answer to this question is that the FBI file contained very little new information that was directly material to the GSR issue.

(e) Is the evidence not merely cumulative or impeaching?

CONCLUSION:

With the possible exception of having the wrong witness identify the results of the tests, the material contained in the FBI file as it relates to GSR would be either for purposes of impeachment (Special Agent Peele's credibility in testifying as he did) or would be merely cumulative information. As to the amount of GSR found the information would only have been more accurate than the generalized "small amount" which the parties believed had been found. The answer here is that the evidence in the FBI file is no more than impeachment or cumulative information.

KEN WILLIAMS
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

The court therefore finds that neither the circumstances of discovery nor the contents of the FBI files satisfy every factor of the five part "newly discovered evidence" test.

II. THE ENGLERT PHOTOS:

The court answers the questions submitted as they relate to the Englert photographs as follows:

(a) Will the evidence probably change the result of the trial or proceedings?

35. Prior to the discovery of the pictures of Detective Martin wearing the pants ungloved with the pockets having been turned out, it would have been difficult to argue that GSR contamination of the pocket more likely occurred than not. As Special Agent Peele noted, something had to go into the pocket. GSR would not likely fall from the sky into a pants pocket. The most reasonable inference would be either a firearm, or a hand which had recently fired a firearm, went into the pocket. That would also likely be Mr. Stenson, because they were his pants. Contamination would only be a potential explanation, but not a likely one. The picture, however, shows that prior to the GSR sampling the pocket came out. It came out at a place where the pants and the jacket of a shooting victim (Mr. Hoerner) had been examined and where one examiner was ungloved. Dr. Arvisu stated that these circumstances, alone or coupled with the other known circumstances of potential contamination is such as to make finding gunshot residue in the pants pocket meaningless from any scientifically valid standpoint. Had the ungloved handling and the turning out of the pockets been known

KEN WILLIAMS
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 6
Port Angeles, WA 98362-3015

to the trial court and an appropriate objection made, the GSR testimony would have been excluded. Attorney Fred Leatherman testified at the reference hearing that had he seen the photo he would have made a motion to exclude the GSR testimony. Because the GSR testimony was one of only two pieces of evidence from which inferences directly tying the defendant to the shootings themselves could reasonably be drawn, (the other being blood spatter) it would be hard to say that an error in admitting the GSR testimony would have been harmless. That question, however, is not a question raised in these proceedings.

36. The fact that GSR was found in Mr. Stenson's right front pants pocket would not be admitted as evidence against him if the matter were tried today. The Englert photos are the compelling reason for such an evidentiary ruling. A memorandum to the first PRP attorneys from investigator Ron Bright (Exhibit 83) states: "We need to hire an expert to look into GSR as that was one of the nails in his coffin."

37. However there was other evidence against the defendant. The case was largely circumstantial. In the "Respondent State's Prehearing Memorandum" beginning at line 11 on page 10 and continuing through page 16, the State summarizes the general nature of testimony which was provided at Mr. Stenson's trial. The court will not attempt to summarize the 1994 trial here.

38. In "Petitioner's Post-hearing Brief" at page 9, Petitioner states: "The nonforensic evidence, including testimony regarding finances, insurance policies, demeanor, and Stenson's own statements, was at best ambiguous. Most of the forensic

KEN WILLIAMS
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

evidence had little or no inculpatory value (fingerprints, blood on wall, bullet lead analysis, gunshot residue from Stenson's hand)." This is correct as well.

39. Nevertheless, the State's case presented motive and opportunity which implicated the defendant. The most significant evidence was testimony as to blood spatter. Blood spatter found on Mr. Stenson's pants came from the blood of Mr. Frank Hoerner, one of the victims. According the testimony at trial by the State's blood spatter expert, the defendant's presence at the time Mr. Hoerner was initially assaulted and before he was shot at the location where the body was found was established by the blood spatter pattern on the defendant's pants. The droplets would have been deposited on Mr. Stenson's pants when Mr. Hoerner was struck on the head while standing in the driveway, or while he was in a more upright position being dragged into the room where he was ultimately shot and killed. (VRP 1381 thru 1406.)

40. The blood spatter evidence and opinion as to its ultimate meaning, while challenged by cross examination, was not rebutted at trial.

41. The circumstantial evidence against Mr. Stenson was strong. The GSR evidence made the case stronger. The blood spatter evidence, however, not the GSR evidence, was the most significant evidence at trial. Even if one completely overlooks the GSR testimony, the weight of the circumstantial evidence against Mr. Stenson coupled with the blood spatter evidence directly linking him to the initial attack on Mr. Hoerner is compelling. The blood spatter evidence is a hurdle too high. As long as it stands this court cannot find that even without the GSR testimony the result of the guilt phase of the trial would "probably" have been changed. Petitioners seek a different test

KEN WILLIAMS
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

under Brady as to whether the new evidence would have "undermined confidence in the verdict." That is not a question submitted to this court.

42. In death penalty cases there are two phases. There is the guilt phase and there is the penalty phase. In the penalty phase, the jury is requested to determine whether or not there are mitigating factors justifying imposition of a sentence other than death. Without GSR testimony one might wonder whether or not the mitigation finding would have been different. In order for it to be different, the issue would be whether or not the lack of what was, in the words of investigator Bright, "one of the nails in his coffin", would lead to residual doubt. The State's statutory death penalty scheme does not list residual doubt as a factor for the jury to consider. A request for a residual doubt instruction was presented at trial, denied, and the denial of such instruction was affirmed by the Washington State Supreme Court. In Franklin v. Lynaugh, 487 U.S. 164, 108, S.CT. 2320, 101 L.ED. 2D. 155, (1988) the Court held that residual doubt is not constitutionally required to be a mitigating factor in death penalty cases. Since the jury is not required by either constitution or statute to consider residual doubt, it would be difficult to speculate that they would have considered residual doubt and "probably" have found mitigation factors had they not been presented with the GSR testimony.

CONCLUSION:

The court therefore finds that while the evidence related to the Englert photographs would have led to an exclusion of GSR testimony, that exclusion would not have "probably changed the outcome of the trial or proceeding".

KEN WILLIAMS
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

(b) Was the evidence discovered since the trial and proceedings?

43. While the parties knew Mr. Englert had taken photos of the pants the full content of photos were known only to Mr. Englert, Detective Martin, and perhaps Mr. Walker. The new evidence is not the photos as much as it is that the photos show the pockets turned out with an ungloved Detective Martin holding them. Only Mr. Englert and Detective Martin would have known that had taken place. (Detective Martin testified that he has a vivid recollection that he had gloves on. He acknowledges that his recollection is wrong. He stated that if he had been asked in 1994 he would have likely recalled even then that he had been gloved.)

CONCLUSION:

The court finds that the "evidence" shown in the photos was therefore discovered since the trial.

(c) Could the evidence have been discovered before the trial or proceedings by the exercise of due diligence?

44. The testimony is that the photographs were available to investigators representing both the State and defense. The testimony of Mr. Englert is that when met with the defense investigator Walker, they met for lunch, and that the entire file which included the photographs was on the table. Mr. Walker's reports note the existence of photographs and describe several of them. Two copies of the photographs were printed. Only one remains in Mr. Englert's file. Mr. Walker's report states that Mr. Englert suggested he get copies of the file and photographs from the Prosecuting

KEN WILLIAMS
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 6
Port Angeles, WA 98362-3015

Attorney as it would be cheaper. Mr. Englert told Mr. Walker that Detective Monty Martin had a copy of the photographs (Reference hearing exhibit 16, note 7). Mr. Englert was paid for mailing. The testimony at the reference hearing was that neither Detective Martin nor the Prosecuting Attorney recalled receiving copies of the pictures. Mr. Englert testified that he would not have released the pictures or his file to the defense team without permission. Prosecuting Attorney Bruneau testified that he had never seen the photos nor knew the pants pockets had been turned out on the fourteenth until 2010. A motion for discovery of the Englert notes was filed and argued and the notes were provided. However at the same time the Prosecuting Attorney stated that Mr. Englert would not be called as a witness.

The petitioner argues that because the pictures contain potentially exculpatory evidence they were required to be turned over under Brady even though Mr. Englert was not a witness at trial. Petitioner alleges that he had a right to rely on disclosure under Brady and the discovery orders and because of that there was not any lack of diligence in failing to obtain the photographs at the time. In a footnote at page 24 of the Petitioner's Post Hearing Brief, Petitioner notes:

> At the time that Mr. Walker interviewed Mr. Englert, the defense had no idea that inculpatory gunshot residue existed and had no idea that the pants were going to be subjected to any further testing. Nothing in either Mr. Englert's notes or Sergeant Martin's report gave any hint that Martin had turned the pockets inside out, much less that he did so without wearing gloves.
>
> By the time gunshot reside became an issue, the State had told the defense that Mr. Englert would not be a witness. No one at trial relied in any way on anything that Mr. Englert said or did. There was no reason for the defense to investigate Mr. Englert or to believe that he possessed any evidence relevant to gunshot reside. Nor was there

KEN WILLIAMS
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

any reason for the defense to request photographs from Mr. Englert, given that he was not a witness and no one at trial mentioned or relied in anyway on his photographs.

If due diligence means merely finding that which is there to be found, that requirement would apply to both parties. The Prosecutor would have the same obligation to find the material and, under Brady, would have had an obligation to provide the material (that the pockets had been turned out on the fourteenth) to the defense.

If, on the other hand, the concept of reason applies to due diligence, then all of the surrounding circumstances are appropriately viewed. Again, that seems the more rational concept of due diligence. Discovery in general requires some connection to an issue to be worth pursuing. Mere "fishing expeditions" for evidence are routinely prohibited. Mr. Englert's sole connection to GSR was that he made a suggestion that the pants pockets be tested.

45. Nothing in materials provided to defense stated that the Englert examination included turning the pockets out and anyone being ungloved. It was reasonable to assume, as defense did, that nothing in Mr. Englert's possession would have had any relevance to GSR or even to the case once it was determined that Mr. Englert would not be testifying.

46. No attorney at trial or thereafter realized the significance of the pictures to

GSR until the year 2009. Why would they? There was no reason to suspect they would have any connection to GSR. The ultimate discovery of that connection was one of sheer chance.

KEN WILLIAMS
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

CONCLUSION:

The court finds that defense counsel acted with reasonable diligence at the time of trial and thereafter as regards the discovery of the facts of the pockets being turned out on April 14, 1994.

(d) Is the evidence material?

47. The evidence is material. The information in the photographs of April 14, 1994, is sufficient evidence to cause subsequent tests to be wholly unreliable. Without that photograph or some disclosure by the State of the facts it shows the potential sources of contamination could be, and were, easily explained away.

CONCLUSION:

The content of the Englert photographs therefore are material to the issue of GSR testimony and its validity.

(e) Is the evidence not merely cumulative or impeaching?

48. The photographs would lead to the elimination of the GSR evidence from the trial. They are not merely impeaching. One might argue that they are cumulative in that they simply present another possible source of GSR contamination. The distinction, however, is that the content of the Englert photographs do not merely show another possible source of contamination, they show a potential source of contamination which rises to such a degree that subsequent finding of GSR in the pants

KEN WILLIAMS
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

pocket no longer has any evidentiary viability in light of the potential for unfair prejudice to the defendant.

CONCLUSION:

However, because the evidence would not "probably" change the outcome of the trial, the discovery of the Englert photos and what they show do not meet the "newly discovered evidence test."

ANSWERS TO QUESTIONS RE PETITIONER'S REASONABLE DILIGENCE IN ACTING ON THE EVIDENCE:

The Washington State Supreme Court has further requested the trial court to determine whether:

1) **Did Stenson act with reasonable diligence in discovering the photographs in the FBI file, see RCW 10.73.100 (1)?**

RCW 10.73.100 sets forth time limits for filing collateral attacks. Subsection (1) relates to newly discovered evidence and waives the time limit "if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;"

49. Mr. Stenson has been incarcerated since his arrest in 1993. During all of that time he has been represented by counsel with the exception of PRP No. 5. Does a defendant represented by legal counsel have any duty to investigate or participate in matters concerning his or her conviction beyond counsel's representation? This Court has been presented with no authority on that issue.

KEN WILLIAMS
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

50. To the extent that discovery involves formal pleadings, as it often does, it would be unwise to require an individual represented by counsel to also perform his or her own discovery as it might interfere with, or even be contrary to the purposes and strategies of the attorney representation. A rule requiring a defendant to independently seek out evidence while represented by counsel would be illogical.

51. Mr. Stenson, as is his right, chose to represent himself in filing PRP 5 upon receiving the Englert photos.

CONCLUSION:

The Court finds that Mr. Stenson acted with reasonable diligence in locating the FBI file and the evidence which is contained in the Englert photographs. He reasonably relied on his counsel.

(2) Did Stenson act with reasonable diligence in filing the "Personal Restraint Petition (No. 83130-1)?

52. The State suggests that the Court set some specific timelines within which a PRP should be filed upon receipt of new information. The State suggests reference to time periods used for other rules and statutes or proceedings. Mr. Stenson faces a sentence of death. Death penalty cases are different. Although a year of active discovery preceded Mr. Stenson's trial, issues of blood spatter and gunshot residue came up only at the time trial commenced. Mr. Stenson learned of the Englert photographs on February 9, 2009. He mailed PRP No. 5 to the Court on May 13, 2009, ninety-two days later.

KEN WILLIAMS
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

53. The FBI file was not provided to Mr. Stenson's counsel until May 21, 2009, after Mr. Stenson had filed his PRP No. 5.

54. On January 15, 2009, Ms. McCloud sent an email to Prosecuting Attorney Kelly requesting assistance in obtaining the FBI file. The file was produced on May 21, 2009, some 106 days later. The complications of obtaining the file from the FBI appear to be far less than the complications of filing a Personal Restraint Petition, especially pro se from an inmate held under the close custody circumstances Mr. Stenson serves as testified to at the reference hearing.

CONCLUSION:

The Court finds that Mr. Stenson acted with reasonable diligence in filing Personal Restraint Petition No. 5.

(3) Did Stenson's counsel act with reasonable diligence in discovering the photographs and the FBI file? see *Id.*

55. This question is more difficult to answer. Stenson's trial counsel, as noted, did not believe that the FBI file would contain any relevant information. Defendant's first Personal Restraint Petition attorneys had it suggested to them that the GSR issue be looked at closely but, based on limited resources decided to prioritize their investigation into the blood spatter issue which they felt was more significant. It was. Counsel for the PRP No. 6 requested the FBI file only when their curiosity was piqued by the fact that Special Agent Peele's bullet lead analysis testimony was deemed to have exceeded the scope the evidence could support and after Mr. Shinn had come forward. None of the attorneys at trial or thereafter, including the State's attorneys, felt

KEN WILLIAMS
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

that the FBI file and bench notes would have contained information worth expending energies on pursuing until after subsequent events occurred. It is hard for this Court to second guess counsel's assessments and choice in the setting of priorities. It is only with the advent of the Englert photographs that the material in the FBI file becomes potentially relevant. The FBI file was requested as soon as the Englert photos were discovered. As indicated, the photographs were discovered not by design but rather by luck.

CONCLUSION:

The Court finds that at each stage of the proceedings Stenson's counsel acted with reasonable diligence in discovering the photographs and the FBI file.

(4) Did Stenson's counsel act with reasonable diligence in filing "Petitioner Darold Stenson's Motion to Vacate Conviction or Alternatively Vacate Sentence of Death Pursuant to CrR 7.8(b)". Later accepted by this Court for consideration as a Personal Restraint Petition (No. 83606-0), see Order 569/113 (Oct. 1, 2009)?

56. Defense counsel were in receipt of both the Englert photographs and the FBI file as of May 20, 2009. The Motion to Vacate Conviction, etc., and supporting documentation was filed in the Clallam County Superior Court on August 7, 2009, seventy-seven days later. During the time between receipt of the photographs in January of 2009, and the filing of the motion in early August 2009, defense counsel were taking numerous steps to investigate the meaning of the evidence and in preparing

KEN WILLIAMS
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

for the post-conviction action taken. Under the circumstances the Court does not find that the time taken or the investigations made before filing were unreasonable.

CONCLUSION:

The Court finds Stenson's counsel acted with reasonable diligence in filing the Motion to Vacate, etc (PRP No. 6).

DATED this 16th day of April, 2010.

Respectfully submitted,

KEN WILLIAMS
JUDGE

KEN WILLIAMS
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

OFFICE RECEPTIONIST, CLERK

To: Clevenger, Melinda
Subject: RE: 93-1-00039-1 St v. Darold Stenson

Rec. 4-28-10

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Clevenger, Melinda [mailto:MClevenger@co.clallam.wa.us]
Sent: Wednesday, April 28, 2010 3:06 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: 93-1-00039-1 St v. Darold Stenson

<<stenson findings.pdf>>

Please confirm receipt and indicate whether you would like a hard copy sent through the mail.

Lindy Clevenger

Court Administrator

Clallam County Superior Court

223 E 4th Street Ste 8

Port Angeles, WA 98362

360.417.2386

fax 417.2581

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint of	NO. 83130-1
Darold R. J. Stenson,	Petitioner's Supplemental Brief on Effect of Reference Court's Findings and Conclusions
Petitioner.	

I am somewhat apprehensive in filing this brief because I have this feeling that once again my pleas for truth and justice to be allowed to come forward will simply be ignored and all of the false and untrue statements that an actual pro prosecution/defense team allowed to be entered as facts during my trial, will be allowed again. I have no cites of past cases to present to you. I am not a trained attorney and I do not speak the language of legalize. All I can do and have done is present you with the truth as I know it and ask for common sense to be allowed. I ask why are so few of my statements and accusations ever addressed by the state, prosecutors and appeal courts? They are just ignored! I am very frustrated in reading this brief because I find myself sounding so bitter and angry but after enduring over 16 years of untrue accusations and then false convictions I find that this is about all that I have left except for the faint glimmer of hope that common sense and the truth will finally be allowed to enter into my case.

For over 16 years I have proclaimed my innocence, fighting against a terribly inaccurate and at times false trial record that was allowed to come into existence simply because my trial lawyers deliberately chose to indulge in their own priorities instead of defending an innocent man against false charges as was their solemn duty.

A few points of interest surfaced during the reference hearing in March 2010 in front of

Judge Williams that really caught my attention. During Fred Leatherman's two day testimony, the only time that he had the courage to even look at me, he stated that if he could have known about all of this heretofore unknown or hidden evidence, he probably would have looked at my case in a lot different light, drawn much different conclusions and we would have probably gotten along much better, having fewer points of contention!

On page 26 of Judge Williams' Findings and Conclusions, he states, "Mr. Stenson, as is his right, chose to represent himself in filing PRP # 5 upon receiving the Englert photos." I found this statement to be incredibly hypocritical because during my trial, Judge Williams decided that I did not have the right to represent myself! A right that every American is supposed to be guaranteed. Why is it only my right to represent myself in court when it did not involve him having to reschedule or delay a planned vacation? In this hearing, as in my trial, Judge Williams chose to ignore all of the issues that I brought up and presented to him. It seems that my handwritten briefs and letters didn't even deserve his time or respect as none of them were answered or even considered, then or now.

He goes on to say that the subject of the GSR had very little effect during my trial, but this is a total misstatement of what actually happened! This now proved false and inaccurate testimony was previously thought by Judge Williams to be a very telling factor in my obvious guilt. If it was such insignificant evidence, why did he use this testimony as a prime reason for my guilt for over 16 years? Why did the prosecutor use this in declarations of my guilt for all of this time? Why did appellate court judges state that the presence of GSR was an indicator of my obvious guilt in rejecting my many appeals for justice? Even my own appointed defense attorneys, who Judge Williams forced upon me, told the jury in their closing statements that this

GSR evidence absolutely proved that I had been involved in not just one but two shooting events! For Judge Williams to say that this GSR testimony did not have a significant effect on my jury and then with all of the appeal courts, is incorrect at the very least and smacks of him just trying to protect his faulty and false conviction of an innocent man for crimes that he did not commit! This is not a harmless error as both he and the state would have you believe in trying to protect their false conviction!

For over 16 years this GSR evidence and testimony was thought by many to be an absolute indicator of my obvious guilt. But we all know now that this is totally and absolutely false. Judge Williams goes on to tell us that the minute amounts of blood found on my pants are now the absolute proof of my guilt. He makes this faulty and false statement in spite of the fact that the state had three different expert opinions on how this came to be. The prosecution finally chose Mr. Grubb's opinion because it agreed with the fantasy that the state wanted to present in court, in spite of the statement from one of their other experts, Mr. Rod Englert, who stated that Mr. Grubb, "...isn't even a blood spatter expert." Mr. Grubb has totally been discredited in many legal circles for his wild and unaccredited theories on such subjects as "ear prints"! But this state and this judge have chosen to go along with this person's opinion and continue to ignore the fact that there has never been a rebuttal opinion. The blood expert hired by Mr. Leatherman, Stuart James, was never asked to present his own expert opinion on the blood spatter evidence or to even comment on the possible theories that I had as to how this could have happened. He was only asked by Mr. Leatherman to sign Leatherman's copy of Mr. James' book and if the state's theory was possible, nothing more! The state falsely tells you that he gave an opinion when he did not!

How can all of the appeal courts and Judge Williams continue to ignore my claims and the facts about how weakly the prosecution came to arrive at their "conclusive evidence"? Please ask yourselves why would you hire an expert witness and then not ask him for an expert opinion? It made no sense then and it makes no sense now. Please do not ignore this fact any longer!

For the whole of my trial Mr. Leatherman was putting up a front so as not to incur the criticism of his fellow defense attorneys, just like he told me that he would do and just like I told Judge Williams that he would do! There was never a real attempt to represent me and to prove my innocence and he has readily admitted this. He was only concerned about his religious inspired mission to save my life. He continued this front on the witness stand during this hearing when during one of his ramblings, he looked at the Judge and made the off-hand comment that "he loved his Bar card." When I last had it checked, he was no longer a member of any Bar association! Not Washington and not Kentucky, the state where he now resides, nor has he been a member for some time. No legal firm and no individual wants to be affiliated with him as a lawyer, yet I was forced to accept him as my defense attorney during my trial even when he publicly stated that he had no plans or desire to even try to show my innocence!

As I told Judge Williams and the appellate courts long ago about the faulty GSR evidence, so too have I told them that the blood evidence is just as faulty. But they have chosen to ignore these facts just as they have chosen to ignore the truth about the GSR evidence for over 16 years. In much the same way that this GSR evidence was finally shown to be false, sometime in the very near future so too will the blood spatter claims be shown to be false. I only need the opportunity to do so!

Judge Williams also makes mention of the revelations made by Mr. Robert Shinn in

confessing that others he knew had actually laughed and bragged about setting me up for my family to be robbed and these senseless murders. What he doesn't make mention of is that another individual, unrelated to Mr. Shinn in any way, has come forward and made basically the same claims about the same people. Only he is so afraid of these individuals that his declaration has been presented under court seal in Judge Williams' court!

Clallam County officials have gone before Judge Williams court and blatantly declared that the named individuals have had nothing to do with my case, ever, and that their whereabouts during the time of the murders have all been verified. This is an absolute and blatant lie! Mr. Nelson, who is accused of being the ringleader of the gang that was doing the bragging about committing the crimes, was cleared by Clallam County law enforcement of even being in Washington State when the murders were committed. How did they do this? They found a traffic ticket for Mr. Nelson from Missouri written in May of 1993 and apparently that proves he had nothing to do with the murders committed in March of 1993. This and that he told them he was working there caused them to clear him! But the company that he was supposedly working for is out of Canada and out of business, so his employment could not even be verified let alone where he was in March of 1993! He has no records of tax payment on any of this supposed income nor any paperwork to verify his employment. But Clallam County law enforcement and prosecutors have declared to Judge Williams that Mr. Pat Nelson has been cleared but they have done so with absolutely nothing to verify it! Their willingness to even perjure themselves to protect their false conviction goes beyond belief and they do this secure in the knowledge that no court or judge will hold them accountable or even check on the truth of their statements.

There is a pattern of lies and unethical conduct by Clallam County prosecutors and

officials throughout my whole trial and appellate process. This is evidenced by the totally false declaration instigated by the state's special deputy prosecutor Loginsky, written by Det. Monty Martin and submitted to Judge Ken Williams' court on 1/8/2009. In this declaration Det. Martin swears that he wears gloves at all times in handling evidence related to my case which was an absolute lie.

The special deputy prosecutor tells various courts over and over again that everyone knew of the hidden Englert photographs. If this was so, why would she ~~would~~ think that she would get away with the submission of a completely false declaration.? Is this not the commission of a grievous felony in an attempt to see me murdered? What I find even more intriguing and condemning that this outrageous lie is that neither Det. Martin nor special deputy prosecutor Loginsky have ever apologized for this obvious and abusive lie. They have never even tried to explain it or acknowledged doing it. This behavior typifies the conduct of the state's prosecutors and Clallam County officials throughout my whole trial and appeals process! They seem to figure, so what if we have been caught committing obvious felonies! No one is going to do or say anything about it and if we just continue to ignore it, like what has been done with the truth throughout my case, it will just go away! Especially if they could bring about my murder as soon as possible! How can the highest court in the State of Washington just ignore the prosecutor's behavior and all of my other unanswered statements and accusations?

In another of the state special deputy prosecutor's many demands for my immediate murder, she mentions Mr. Leatherman's investigator Mr. Jeff Walker. She again outright lies in saying that he saw pictures of Det. Martin wearing my pants. What he actually saw was just some closeup pictures of my pants as he testified to at the hearing in front of Judge Williams. I

have always wondered why Mr. Walker was so inept as an investigator in my case. As is evidenced by his testimony during his recent hearing and in a pretrial cross examination by Prosecutor Bruneau, where Mr. Bruneau almost makes Mr. Walker cry when he was unable to answer questions about his shoddy investigation! He was an inept FBI agent who was asked to leave that agency and a terrible investigator who should never have been hired in my case. What I find so interesting now is that a part of his testimony during the recent hearing where he states, and I quote, that he is "good friends with Det. Monty Martin"! Now I personally understand why his work was so unprofessional. Why would a defense attorney even use an investigator who is friends with the lead detective in the case and not bother to inform the defendant of this and tell him why it was done?

But this matter goes even deeper. Prior to the start of this hearing, an investigator for the Federal Defender Office, Chuck Formosa, was checking on paperwork that Clallam County had not previously made known to us, when he found paperwork of Prosecutor Bruneau, from one of my pretrial hearings, that had the names of some of the suspected gang members written on the back of them with other related notes. These named individuals are people that Clallam County prosecutors have declared have never been linked to my case in any way, yet there they are on the back of my case paperwork, proving that the prosecution knew of these people being involved in my case. But once again none of this was ever revealed to me or my defense team.

When my attorneys confronted Clallam County prosecutors with this new found evidence, we were told that this only happened because Mr. Bruneau was being efficient in recycling old paperwork!! But if this was true and he was using my old paperwork for another case, why were these papers put back into my case file instead of a new file for that new case?

And why was there not more detail on this supposed new case? These individuals that Mr. Shinn and the other witness have supplied are involved in my case somehow and that involvement has also been covered up just like the ungloved pictures of Detective Martin and the GSR bench notes were for over 16 years. The foul deeds and the coverups that these prosecutors and county officials indulge in go very deep but no one else, nor do the courts show the slightest interest in actually finding out the real truth in this case. How can all of my statements, questions and accusations go unanswered? Why is there so little judicial interest in this case other than to hasten my murder?

I also found it very interesting that during my trial, the prosecution only said that the GSR was proof of my guilt and it could have only happened because I was involved in a shooting event. But during this hearing, in a feeble attempt to protect the dirty deeds done by Detective Martin, they have come up with a whole multitude of reasons as to how the GSR came to be found in my pocket. These range from me cradling my wife, being in proximity to Frank Hoerner's jacket, my pants being put in Detective Martin's trunk with his guns, to me sitting in the sheriff's car. But they would not and could not explain why the GSR swab that they took from the sheriff's car was never ever tested! Nor would or could they say why none of these explanations were never given to the jury during my trial. If they knew of these reasons then, and they did, why were they not compelled to disclose this too?

Another important finding of fact that occurred during the hearing that Judge Williams chooses to ignore is Mr. Englert's billing record that was sent to Clallam County in care of Detective Martin. During the hearing Mr. Englert was quite proud in proclaiming the accuracy of his billing practices but Mr. Gombiner went on to show the court where Mr. Englert clearly

charged Clallam County for a copy of Detective Martin's gloveless hand pictures and for the postage to send it to Detective Martin. This bill was also paid unchallenged! Detective Martin testified that he never received the pictures but he also testified that he had vivid but false memories of wearing gloves while wearing my pants! He also testified that Mr. Bruneau had "chewed him a new one" because he had to admit that he had senselessly put my pants on for their experiments at Mr. Englert's place of business. Reason and logic would tell us that Mr. Englert's billing was accurate, the bill was paid, and that Detective Martin did in fact receive these pictures. When he saw that he was not wearing gloves, he chose not to show them to Mr. Bruneau in order to not have to endure another blow to his pride from yet another verbal lashing from Mr. Bruneau. With Mr. Englert not being called as a witness and the defense team showing little or no interest, there was little chance that his deceptions would be discovered and he continued with his deceptions right up to January of 2009 when he submitted a declaration to Judge Williams swearing that, "of course, he wore gloves at all times." He will never be charged for any of his deceptions and dishonesty - instead he was only forced into an early retirement. Yet the state prosecutors still demand my murder for crimes I did not commit!

Mr. Bruneau was complaisant in this criminal deception when he and Detective Martin sat in court during my trial and listened to Mr. Grubb tell the jury that no one had ever put my pants on when both of them knew that this was not true. Again I tell you, this was not "harmless error"! It greatly contributed to my faulty conviction.

These above mentioned foul deeds, omissions and exaggerations by the state prosecutors coupled with Judge Williams' findings and his statement that the defense did not learn the truth "because they relied on (albeit misplaced) faith in the state's assertions that it was turning over

all *Brady* evidence and forensic results," clearly and loudly shows that very serious *Brady* violations did occur and I should be demanded a new trial. Once again, this is not "harmless error"!

Brady v. Maryland, "holds that when the state puts on false evidence and makes false and misleading arguments to a jury, a new trial is required if any reasonable likelihood exists that the misconduct affected the verdict." Please read my appeal and the true and sensible statements I make in telling you about my faulty defense and the unethical and illegal actions of the state prosecutors. The state doesn't even try to discredit the truths contained throughout my appeal. All they have tried to say is that it was all my fault because I did not discover their deceptions earlier and I should be murdered as soon as possible because I did not discover their hidden evidence. There is a very "reasonable likelihood" that these lies, and false and very leading arguments did effect the outcome of my verdict and I should be demanded a new trial.

This example will show you that the State of Washington's "Special Deputy Prosecutor" has absolutely no desire to actually see that the truth should ever come to light in my case! In her latest of her dozens of "Motions For Order Terminating the Stay of Execution" requests submitted to the Superior Court of Washington for Clallam County, in spite of her intimate knowledge of my pending PRP's before this Court, this "special prosecutor" seems to have nothing else to do in life but to demand my murder before more of the many misdeeds of Clallam County prosecutors and other county officials can be brought to judicial and public light.

The state's special deputy prosecutor goes on to say that the trial record clearly shows that I was the only adult present at Dakota Farms at the time of my wife and friend's murder. So she actually shows the court here just how faulty the trail record is, because in her very next demand

for my immediate murder, she plainly states the truth that there were two other adults present - David Oberman and Tracy Reed, and for some reason neither of them ever had their hands tested for GSR, while I did and that test was negative for me.

The "Special Deputy Prosecutor for Clallam County" leaves out all of the now discredited GSR and other faulty evidence and concentrates on the blood. She takes great liberties once again, just like during my trial, in presenting a lot of faulty, outright false, never presented at trial testimony and all of this was virtually not rebutted by my defense attorneys because it was not part of their "strategy"! How can unrebutted testimony be relied on as truth especially when it could have been so easily rebutted?

She very deceptively tells the court that Mr. Englert was a "non-testifying expert." But what she fails to tell the court was that Mr. Englert's opinion was so outlandish and not what the prosecutor at that time wanted to present that his conclusions were never presented at court in spite of being paid for! How are we to even know what she quotes of Mr. Englert is true? Neither his testimony nor his conclusions were ever presented at court but the "special prosecutor" now wants to present his unrebutted supposed quotes as a reason for me to be murdered as quickly as possible!

If I would have had an even remotely interested defense team at trial, a blood expert would have been looked for who could have logically explained things. The prosecution has me shooting two people at a point blank range, severely beating one of them on a very dusty road, then dragging him into a house where I have three children sleeping, and shooting him there. If any of this was true I should have had blow back blood spatter all over my hands, arms and clothing. I should have been covered with bloody smeared stains and the same dust that covered

Frank Hoerner should have been all over me! But I was not! Yet none of this obvious rebuttal testimony was even attempted by my defense team because it simply was not part of their religious strategy! The Clallam County Sheriff's Department spent over two weeks at our farm testing all of my clothing, checking all of the drains and they found no bloody clothing or evidence in the drains that I had tried to wash up - nothing! But again my fine defense team did nothing to point out all of these obvious inconsistencies. Why? Again, it simply was not in their plans, they did not have a single care about my innocence! And they publicly stated this!

Then she goes on to tell Judge Williams' Court another absolute lie. She states that, "Stuart James also tendered an opinion that was generally in agreement." Mr. James never tendered an opinion in any way! The only thing that Mr. Leatherman asked of Mr. James was if the state's opinion "was possible," nothing else. He was never asked to develop his own opinion or even comment on my possible opinions. Is being outright lied to by "special deputy prosecutors" such a common place occurrence that judges just allow this to happen? If there are no repercussions for the untruths presented by prosecutors, how can any conviction be looked at as being unblemished? Do they do this on a regular basis or just here because I have no legal experience and she is attempting to take advantage of my inexperience? I don't know, I only know that it is not true and that it is wrong!

I am amazed that the state and their *special deputy prosecutor* have so little response to the statements of facts and the accusations that I make in my appeal. I believe that this is because they feel that the mistaken assumptions and outright lies that they have presented, almost totally unrebutted, for over the past 16 years and even after the hearing held in front of Judge Ken Williams will be automatically taken as fact and truth because it always has been. This has

become so obvious that they have absolutely no interest in getting to the actual truth of my case as is their legal duty! Their only interest is in preserving their faulty and false conviction and they seem to be willing to do and say almost anything they can to bring about my murder before anymore of Clallam County and their county officials illegal deeds can be brought to light!

They keep on saying that their previously undiscovered hidden pictures of Detective Martin wearing my pants taken by Mr. Englert were well known and seen by everyone. But in reality neither myself, my attorneys nor any of my investigators were made aware of the pictures of Detective Martin wearing my pants showing his ungloved hands. The only pictures ever made available to us were a few closeups of my pants, none of the others! The only people with knowledge of all of the incriminating pictures were Rod Englert, Detective Martin and probably prosecutor Bruneau. If what the appointed special deputy prosecutor has said was true, she too would have been aware of them and hopefully she would not have instructed Detective Martin on 01/08/09 to write a sworn declaration to Judge Ken Williams in the Superior Court of Clallam County in which he states that "he wore gloves at all times," in handling my pants. We now know that this declaration was a complete and utter lie! As was the GSR claims because Detective Martin contaminated the evidence many times, with the most severe time being when he pulled out my pants pocket with his ungloved hand after handling his own firearm and not wearing a protective glove a full week before he actually took the GSR swab and sent it to the FBI to be tested!

Please give me the respect of thoroughly reading my appeal and then try to find where the state prosecutors ever attempt to answer my questions and accusations in a truthful manner. All I

ask for is fairness, where what I have to say is acknowledged and considered, not simply ignored like it has been for far too long! Please grant me a deserved new trial and allow me to right these judicial wrongs. Thank you.

DATED this 2nd day of June, 2010.

Respectfully submitted,

Darold R. J. Stenson
Petitioner